STATE OF MICHIGAN

COURT OF APPEALS

BEAUMOUNT CORPORATION,

Plaintiff-Counterdefendant-Appellant,

v

NEWTON A. SLATER and ALICE SLATER,

Defendants-Counterplaintiffs-Third-Party Plaintiffs-Appellees,

v

LEONARD M. FERGUSON a/k/a LEE FERGUSON and TASSIE FERGUSON,

Third-Party Defendants-Appellants,

and

JAMES LUMBER COMPANY,

Third-Party Defendant'

UNPUBLISHED
April 8, 2003

No. 237412
Genesee Circuit Court
LC No. 96-053129

Before: Gage, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Plaintiff Beaumount Corporation and third-party defendants Leonard and Tassie Ferguson appeal on leave granted the circuit court's order denying appellants' motion requesting an arbitration decision based solely on their arbitration brief and requesting the preclusion of any arbitration evidentiary hearing. This case arises out of a residential construction dispute; the facts of which are not relevant for purposes of this appeal. The provisions of a stipulated

arbitration order and their application to the arbitration proceedings give rise to this appeal. We affirm.[1] This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff filed this action in the circuit court in 1996. In August 2000, the parties entered into a stipulated order to submit the matter to arbitration. That order, dated August 17, 2000, provided for the submission of the matter to arbitration pursuant to the arbitration statutes, MCL 600.5001 *et seq.*, and MCR 3.602. The order of arbitration also provided in relevant part:

> [T]he [parties'] arbitrators shall, within 30 days of their appointment, select a neutral arbitrator. If the said arbitrators fail to appoint a neutral arbitrator within the 30 day time period, either party may petition the court for appointment of a neutral arbitrator; and
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> * * *
>
> [T]he parties shall submit their respective arbitration briefs to the arbitrators and to counsel for the opposing party no later than forty-five (45) days from the date of this order. Failure to timely submit arbitration briefs shall not be cause for extending the deadline for the arbitration hearing . . . set forth below; and
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> [T]he parties shall have the right to submit reply briefs to the arbitrators and to counsel for the opposing party no later than fifteen (15) days after being served with the opposing party's arbitration brief[; and]
>
> [T]he arbitrators shall conduct a hearing and render a decision no later than twenty-eight (28) days after the deadline for service of the parties' reply arbitration briefs, and shall have authority to render a decision based upon the arbitration briefs submitted by the parties in the event that a hearing is not scheduled prior to the aforesaid deadline. In the event that neither party fails to file an arbitration brief, the arbitrators shall nevertheless have authority to render their decision by the deadline set forth herein . . . .[2]

According to appellants, they named their arbitrator on August 23, 2000, six days after entry of the arbitration order, and notice of this selection was sent to the Slaters.[3] Pursuant to a letter dated September 18, 2000, appellants requested that the Slaters appoint an arbitrator so the

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[1] For purposes of this opinion, we shall reference the appellees as the Slaters.

[2] We struggle to understand the meaning of this last sentence. As written, it contemplates a situation where both parties file an arbitration brief; therefore, we question why the sentence goes on to provide that the arbitrators nevertheless have authority to render a decision by the deadline. If the language was intended to address a situation where neither party filed an arbitration brief, it would only make sense that a hearing would be required prior to the decision, otherwise the arbitration panel would have no facts or arguments to consider.

[3] The order of arbitration does not provide a deadline for the parties' selection of their arbitrators.

parties could move forward in preparing their arbitration briefs. The Slaters named their arbitrator on September 21, 2000, and provided appellants notice of the selection.

However, the neutral arbitrator was not appointed in a timely fashion (thirty days) as required by the order of arbitration. On November 8, 2000, presumptively before the neutral arbitrator had been appointed, appellants served their arbitration brief on the Slaters and the two named arbitrators and asked to be advised of the selection of a neutral arbitrator. The service of appellants' arbitration brief occurred more than a month after the forty-five-day deadline expired.

The record indicates that sometime in early November 2000, the neutral arbitrator was appointed by the two named arbitrators. Appellants served their arbitration brief on the neutral arbitrator on November 13, 2000. The language of the order of arbitration required the arbitrators to conduct a hearing and make a decision within twenty-eight days after the deadline for service of the parties' arbitration reply briefs. At the latest, this would have been eighty-eight days after August 17, 2000, or November 13, 2000. However, by November 13, 2000, there had been no hearing or decision, nor had the Slaters submitted an arbitration brief; all that had occurred was the selection of the entire arbitration panel and the submission of appellants' arbitration brief.

The record reflects that nothing else happened in this matter until April 23, 2001, five months after the deadline for a hearing and decision, when appellants requested that the arbitrators make a decision based only on appellants' arbitration brief, which was the only arbitration brief that had been submitted. Appellants also requested, in light of the situation, that the arbitration panel render a decision in their favor and dismiss the Slaters' counterclaim. On May 31, 2001, the Slaters submitted their arbitration brief. On June 14, 2001, the appellants responded with a reply brief requesting that the arbitration panel make a decision without a hearing, based solely on appellants' brief.

On August 13, 2001, the arbitrators set three dates for arbitration hearings to be conducted. The arbitrators acknowledged that the hearings were scheduled about eleven months after the time contemplated by the August 2000 arbitration order, noting that the Slaters failed to file their arbitration brief until May 31, 2001, well after the October 2, 2000, date agreed upon by the parties. In response to appellants' argument that pursuant to the order of arbitration, the arbitrators did not have authority to conduct the hearing, the arbitrators stated:

> Our authority, or the lack of it, to serve as arbitrators derives from the order of August 17, 2000. The order does not provide that the arbitrators lose authority to conduct an evidentiary hearing or to reach a decision on the merits if the scheduling requirements of the order are not satisfied. Absent a clear expression in the order that the arbitrators are deprived of authority under such circumstances, we cannot infer such a result.

The arbitration panel also indicated that the circuit court would be the more appropriate forum to address the issues raised by appellants. However, the panel further indicated their belief that the delays were not sufficiently prejudicial to appellants to find that the Slaters had waived their rights to a hearing.

On August 31, 2001, appellants filed a motion in the circuit court, asking it to rule on the question whether the arbitrators had authority to conduct the hearing. Appellants requested that the court order the arbitration panel to render a decision solely on their arbitration brief. The circuit court heard the motion on September 10, 2001, and took it under advisement. On October 3, 2001, because the court had not yet made a decision on their motion, appellants filed an emergency motion for stay of the scheduled October 5, 2001, arbitration hearing, pending resolution of the issue regarding the arbitrators' authority to hold an evidentiary hearing. On October 4, 2001, the neutral arbitrator contacted the circuit judge, who indicated that the arbitration hearing should commence as scheduled. The arbitration commenced on October 5, 2001.

On October 8, 2001, the circuit court entered its order denying appellants' motion for a decision by the arbitrators based solely on their brief. The court ruled that appellants suffered no prejudice occasioned by the delay and that any additional expense to appellants by virtue of the delay caused by the Slaters could be assessed as costs and/or mediation sanctions. The circuit court ordered that the hearings proceed. Continued arbitration hearings were held on October 11 and 12, 2001; however, this Court granted appellants' application for leave to appeal and stayed any further proceedings or decision.

Appellants argue that the stipulated order regarding arbitration clearly provides that in the event an arbitration brief is not filed in a timely manner and the hearings not conducted in the time set forth in the arbitration order, the arbitrators are required to decide the matter without a hearing; therefore, appellants were entitled to a decision based solely on their arbitration brief. Appellants maintain that the arbitration panel retained power to render a decision but lost authority to conduct a hearing. Appellants assert that "prejudice" is not required. Additionally, appellants argue that their arbitration brief was late only because the Slaters' arbitrator failed to timely notify them that the neutral arbitrator had been selected.

The Slaters argue on appeal that arbitration hearings should continue, with a decision rendered thereon, and that the issue of the deadline was simply a procedural matter within the province of the arbitrators. Moreover, assuming that the arbitration order could be read to require a decision without a hearing,[4] such a provision is contrary to law, which, under MCR 3.602, requires an evidentiary hearing, and the offending language should be excised from the arbitration order with the remaining language left intact. Additionally, according to the Slaters, appellants suffered no prejudice by the missed deadlines. Finally, the Slaters argue that appellants also filed a late arbitration brief, they did not raise an issue about the missed deadlines until five months after a decision was supposed to have been rendered by the panel, and that appellants' late brief could not be excused by the claim that they were waiting for the selection of the neutral arbitrator; appellants could have served the parties and the two named arbitrators in a timely manner.

The existence and enforceability of the terms of an arbitration agreement are judicial questions for the court. *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000).

[4] The Slaters do not concede this point and claim that the order of arbitration does not require a decision without a hearing under the circumstances.

Judicial questions are reviewed de novo. *Id*. "[A]rbitration is a matter of contract." *Rowry v Univ of Michigan*, 441 Mich 1, 10; 490 NW2d 305 (1992). The authority of the arbitrators is derived from the agreement. *Id*. Thus, the arbitrators are bound to act within the terms of the arbitration agreement. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 496; 475 NW2d 704 (1991). "[T]he parties' contract is the law of the case in this context." *Id*. If the arbitrators act beyond the material terms of the contract from which they draw their authority or in contravention of controlling principles of law, they exceed their scope of authority. *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982). Unless the arbitration clause is not susceptible of an interpretation covering the asserted dispute, any doubts regarding the arbitrability of an issue are resolved in favor of arbitration. *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 235; 590 NW2d 580 (1998).

The interpretation of arbitration agreements is governed by the same principles applied to the interpretation of other contracts. *Id.* at 234. The primary goal is to determine the parties' intentions. *Id*. If the language of the agreement is clear and unambiguous, the parties' intent will be determined from its plain sense and meaning. *Id*. Here, of course, the arbitration agreement is enveloped in the stipulated order.

It is undisputed that deadlines were not met in this case by either party. Appellants did not timely submit their arbitration brief, and we find the excuse for the delay, not knowing the neutral arbitrator's identity, to be unconvincing. It is not entirely clear from the record which party or arbitrator was at fault for not timely selecting the neutral arbitrator and providing the appropriate notice. Even had the neutral arbitrator been selected, with proper notice given, by the required thirtieth day after both parties had appointed their respective arbitrators, October 21, 2000, the briefs were due back on October 1, 2000. There can be no argument that the Slaters appointed their arbitrator late, where the arbitration order does not set a deadline for said appointment. Appellants could have timely submitted an arbitration brief to the Slaters and the two named arbitrators, and in fact when they first served their brief, it was only to the Slaters and the two named arbitrators. There is no question that the Slaters' arbitration brief was also untimely, greatly more so than appellants' brief. Yet appellants did not raise any issues regarding the passing of deadlines until five months after the deadline for the arbitration panel to conduct a hearing and render a decision. This fact runs contrary to appellants' contention that they continually attempted to press for a timely resolution of the case.

Reviewing the stipulated arbitration order, the paragraph concerning the timeline for submitting briefs does not identify the result of an untimely submission, except that the deadline for the arbitration hearing and decision will not be extended. Where a brief is untimely, this particular paragraph does not provide for a decision without a hearing and does not require a decision rendered solely on a timely brief.

Further reviewing the arbitration order, the paragraph concerning the decision and hearing timeline does indicate a contingency should the deadline not be met as in the case before us today. This contingency, which does not set forth any further deadlines, provides the arbitration panel with authority to render a decision predicated only on the arbitration briefs. However, it does not require the panel to do so. We note that if the panel had invoked the provision allowing a late decision based solely on the briefs, there is no language in the arbitration order requiring the panel to exclude from consideration an untimely brief. Additionally, appellants fail to satisfactorily argue a valid reason for why their untimely brief

should be considered and not the Slaters' untimely brief in the context of the panel rendering a decision without a hearing. Because appellants seek a decision from the arbitration panel without a hearing, and because neither of the parties' briefs should be considered if the arbitration order is construed as prohibiting the consideration of untimely briefs, the panel would be left with nothing to render a decision upon. Therefore, we reject any contention by appellants that a decision should be made solely on their untimely arbitration brief.

The question remains whether the arbitration panel acted outside the scope of its authority in conducting a hearing beyond the deadline; there is no authority in the arbitration order to so act. However, we conclude that through their respective actions and inactions, the parties effectively waived strict conformance with the time deadlines contained in the arbitration order. See *Kennedy v Brady*, 43 Mich App 760, 764-765; 204 NW2d 779 (1972).[5] Both parties submitted untimely briefs, the neutral arbitrator was selected late without either party requesting the circuit court to appoint the arbitrator, and the deadline for a hearing and decision passed without objection for five months. Therefore, we find that the circuit court did not commit error in denying appellants' motion and in allowing the hearings to proceed albeit for different reasons relied on by us today. *Griffey v Prestige Stamping, Inc*, 189 Mich App 665, 669; 473 NW2d 790 (1991).

Affirmed.

/s/ Hilda R. Gage
/s/ William B. Murphy
/s/ Kathleen Jansen

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[5] In light of our opinion, it is unnecessary to address the Slaters' argument that an arbitration provision that deprives a party of an evidentiary hearing is void as illegal. We do note that the Slaters fail to provide any relevant authority in support of their position. Regarding the issue of prejudice, we agree with appellants that prejudice is not relevant in answering the question whether the arbitration panel acted outside the scope of its authority. The Slaters reliance on *Brucker v McKinlay Transport, Inc*, 454 Mich 8; 557 NW2d 536 (1997), is misplaced because there our Supreme Court simply concluded that an illegal provision of an arbitration agreement did not require the entire arbitration agreement to be thrown out, where there was no prejudice to the parties. *Id.* at 18-19.